IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELALTE SIDE

CRIMINAL APPLICATION NO. 4637 OF 2006

Kishan Shankarrao Ghodke ..Applicant
V/s
Naresh Amrutlal Shah & Anr. ..Respondents.

Mr.R.S. Deshpande, Advocate for the applicant.
Mr.Yogesh Deshpande, APP for the State.

CORAM : J.H. BHATIA, J.

DATE : 6TH JUNE , 2007.

P.C.

. Heard Mr.R.S.Deshpande, learned Counsel for the applicant and Mr.Yogesh Deshpande, learned Counsel for the respondent. Perused the copies of the judgment and other relevant documents.

2. The applicant has filed this application seeking leave to prefer appeal against the order of acquittal in the complaint under section 138 of Negotiable Instrument Act filed by him.

3. According to the applicant, respondent No.1, who is the original accused, had taken loan of Rs. 1 lakh from him on 6/11/1998. He had promised to repay the amount within 10 months and he and one Rakesh Lomre had

executed one document also assuring payment. He did not make the payment in spite of assurance. Finally in order to discharge the liability on 30/4/2004 the respondent issued two cheques of Rs.75,000/- each. The total amount of Rs.1,50,000/- was to cover the principal amount of the loan and damages to the tune of Rs.50,000/- for late repayment. These two cheques were presented to the bank but they were dishonoured for want of sufficient funds on 5/5/2004. Thereafter in spite of statutory notice, the respondent did not make the payment and the complaint came to be filed.

4. In support of his complaint, in examination - in -chief the complainant filed his affidavit. In cross-examination he stated that he was not acquainted with Rakesh Prabhakar Lomre, who was one of the executants of the document dated 6-11-1998. He also admitted that in 1995 certain cheques were given to him and those cheques were of Anand Automobile and Viswas Automobile. Those were partnership firms. Both these shops were closed about 5 years before. He admitted that on 8/7/2001 he had withdrawn amount of Rs. 55,000/- from the account of the accused by presenting a cheque. It was the defence of the accused that no

cheques were issued on behalf of the firm, which were not in existence they are the cheques were issued in discharge of any debt or liability. According to him, those two cheques were misused. The learned trial Court accepted this plea mainly on the ground that Ramesh Lomre and the accused had jointly executed the agreement in 1998 but in spite of that the complainant denies that he was acquainted with Rakesh Lomre. In view of his admission that certain cheques were with him since 1995, it appears that one of the cheques was used for withdrawal of the amount of Rs. 55,000/- in 2001. The learned trial Court observed that if out of the dues of Rs.1 lakh, amount of Rs.55,000/- was already paid or withdrawn, there was no reason for the accused to issue two more cheques of total amount of Rs.1,50,000/- in 2004. In view of this, the trial Court found that the applicant appears to have misused the cheques and failed to prove that the cheques were issued to discharge any existing liability.

5. I do not find any fault with the approach of the trial Court. Besides this, it may be pointed out that it is the case of the complainant himself that he had advanced the loan of Rs.1 lakh on 6/11/1998. According

to him, the amount was to be repaid within 10 months. It means the amount was to be repaid as per the agreement on or before 6/9/1999. No where in his complaint or in his affidavit filed in examination-in-chief, the complainant has averred or deposed that within three years from 6/9/1999 the accused had acknowledged the liability or had made payment in writing giving fresh period of limitation. As he does not claim that there was any such acknowledgement of the liability within the period of limitation the loan could be recovered by filing a suit on or before 9/9/2002. When the two disputed cheques were issued on 30th April, 2004, the said liability was already barred by limitation and was not legally enforceable. Section 138 of Negotiable Instrument Act creates a criminal liability in respect of a cheque, which is issued for the discharge of any debt or other liability. Explanation to Section 138 of Negotiable Instruments Act clearly provides that " for the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability". If the debt or liability is not legally enforceable, the cheque issued for the discharge of the same, is not covered by the provisions of Section 138 of Negotiable Instrument

Act. In view of this legal position and the averments made in the complaint, as well as in the affidavit of the complainant the complaint under section 138 of Negotiable Instrument Act based on these two cheques is not tenable under the law. Therefore, I do not see any justification to grant leave to prefer appeal.

6. Leave refused. The application stands rejected.

(J.H. BHATIA, J.)